ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

To: The Commission

REPLY COMMENTS OF
BELLSOUTH CORPORATION

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January 11, 1996

SUMMARY

Virtually all commenters, including BellSouth, support adoption of cost-sharing rules which the Commission should effectuate without delay. Immediate action will encourage rapid relocation and facilitate system-wide, rather than link-by-link, relocations.

The Commission should establish the "proximity threshold" as the method for determining whether the operation of a new PCS co-channel (*i.e.*, co-block) facility creates a cost-sharing obligation. Use of the proximity threshold eliminates the opportunity for disputes. The proximity threshold also provides the benefits of simplicity, consistency, and predictability.

The Commission should revise its Reimbursement Table consistent with its analysis contained in the *NPRM*. A Relocator should be entitled to 100% reimbursement (up to the caps) whenever it relocates a path operating solely on frequencies outside of its PCS block or outside of its market. Further, a Relocator should be entitled to reimbursement for half of its relocation expenses (up to the cost-sharing caps) when it relocates a path operating solely on frequencies contained within the its PCS block, but with only one endpoint within its market.

BellSouth also supports the cost-sharing caps proposed by the Commission but believes that tower modifications should be included within the $150,000 cap, rather than the $250,000 cap. These caps only limit payments between PCS entities; they are "not an upper limit on permissible compensation to incumbents."

The proposed cost-sharing caps protect subsequent PCS entities from paying premiums or exorbitant amounts of money for relocation. No entity incurs a cost-sharing obligation for actual relocation expenses which exceed the caps. Accordingly, BellSouth opposes reducing the reimbursement amount due a Relocator by calculating depreciation from April 4, 1995 — an arbitrary date unrelated to the cessation of operation of particular microwave links. Depreciation should be calculated from the date specified in a relocation agreement for the microwave facilities to cease operation. The cessation date should be a close approximation of the date PCS operations commence.

A PCS entity should be required to satisfy its cost-sharing obligation within sixty (60) days of its issuance of a prior coordination notice for facilities that would have interfered with a microwave path but for relocation. This approach would be easy to administer and would avoid disputes over when a potentially interfering facility was actually placed in operation. Because of the differences between licensed and unlicensed PCS, a different mechanism for triggering a payment obligation by UTAM is warranted. BellSouth has no objection to UTAM's proposed trigger for its payment obligation. In keeping with the financial capabilities of its members, however, UTAM only should be entitled to make installment payments over a five-year period.

Membership of A and B Block PCS licensees in the clearing house is essential to ensure its proper start-up funding. If A and B Block licensees are allowed to "opt out," it will be extremely difficult to determine what the size of the membership will be and how much each

licensee must contribute to cover start-up expenses. This membership does not foreclose the opportunity to enter into private cost-sharing arrangements. However, the Commission should make clear that all PCS entities *must* become members of the clearing house.

BellSouth supports designating PCIA as the clearing house for administering the cost-sharing plan. PCIA satisfies all of the criteria that BellSouth previously suggested for choosing the clearing house.

Because the Commission's relocation procedures were adopted before competitive bidding rules were established for PCS, the Commission should fine-tune its rules to ensure a balance between the interests of incumbents and PCS entities. PCS licensees now must "rush to market" in order to earn a return on the prices paid for their licenses. This financial pressure gives incumbents the upper hand in negotiations because every day that PCS deployment is delayed PCS entities lose money. To balance the interests of incumbents and PCS entities, the Commission should provide incentives for incumbents to relocate early. In this regard, the following expenses may be reimbursable only during the voluntary negotiation period: (1) the replacement of analog equipment with digital equipment; and (2) reasonable legal and consulting fees.

The Commission also should clarify that a microwave incumbent can waive its right to a trial period in a private contractual arrangement. There is no reason to require a PCS entity to return an incumbent to the 2 GHz band because the incumbent's system design proved faulty or because it squandered the lump-sum payment it received for relocating.

Finally, the cost-sharing plan should sunset for all PCS providers on April 4, 2005. New 2 GHz microwave paths are not being assigned primary status. Therefore, any 2 GHz microwave paths remaining in 2005 will be more than 10 years old and should be fully amortized, especially given the equipment's useful life of fifteen years. Similarly, thirteen years will have passed between the Commission's Public Notice requesting that microwave licensees avoid using 2 GHz facilities and the proposed transition date to secondary status. Thus, there will be little harm in assigning secondary status to remaining 2 GHz incumbents on April 4, 2005.

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REPLY COMMENTS

BellSouth Corporation, on behalf of its wireless subsidiaries and affiliates, hereby replies to comments on the Commission's *Notice of Proposed Rule Making*, WT Docket No. 95-157, FCC 95-426, released October 13, 1995.

I. Rules Regarding the Sharing of Costs Associated with Relocating 2 GHz Microwave Incumbents Should Be Adopted Without Delay

The Commission's proposal to adopt cost-sharing rules received near unanimous support. Microwave incumbents, A and B Block PCS licensees, and virtually all potential C Block bidders that commented expressed their support for cost-sharing.[1] Commenters generally supported this concept because it would encourage rapid relocation of incumbents and would facilitate system-wide, rather than link-by-link, relocations.[2] Many commenters felt that it would

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[1] Only two potential bidders on future PCS licenses opposed the adoption of cost sharing rules. Michael P. Rappe, Minnesota Equal Access Network Services, Inc. at 1-2; Infocore Wireless, Inc. at 3.

[2] *See* The City of San Diego ("San Diego") Comments at 3; Valero Transmission, L.P. ("Valero") Comments at 2; Southern California Gas Company ("SoCal") Comments at 3;

(continued...)

reduce the number of required negotiations, and the number of parties involved in the negotiations.[3]

Given this wide-spread support for cost-sharing, the Commission should adopt cost-sharing rules without delay. As the Telecommunications Industry Association ("TIA") noted, adoption of "a fair cost-sharing plan is critical to ensuring expedited introduction of PCS."[4]

II. The Commission Should Adopt the "Proximity Threshold" as the Mechanism for Determining When Reimbursement is Required

Although virtually all commenters support adoption of cost-sharing rules, a number of different mechanisms were proposed for determining when a party incurs a cost-sharing obligation. Many commenters, including BellSouth, advocated that a PCS provider should be required to share in the costs associated with relocating a microwave link if it proposes a PCS facility that would have caused the relocated link interference as determined by application of

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2 (...continued)
Omnipoint Communications ("Omnipoint") Comments at 2-3; UTC Comments at 5-8; APCO Comments at 13; Los Angeles County Sheriff's Department ("Los Angeles") Comments at 2-3; American Public Power Association ("APPA") Comments at 3; Santee Cooper Comments at 1; East River Electric Power Cooperative ("East River") Comments at 2.

3 Valero Comments at 2; SoCal Comments at 3-4.

4 TIA Comments at 8. Contrary to the suggestion of AT&T, the *specific* cost-sharing requirements adopted in this proceeding should not be extended to all emerging technology services. AT&T Wireless Services, Inc. ("AT&T") Comments at 11, n.30. Rather, the Commission should only impose a general cost-sharing requirement on all emerging technology providers. Specific cost-sharing requirements for each emerging technology service should take into account the unique characteristics of the service and the relevant incumbent community and, thus, should be adopted in separate proceedings. *See* BellSouth Comments at 2-3.

TIA Bulletin 10-F (or the most current version thereof) and the Irregular Terrain Model.[5] Upon further consideration, however, BellSouth now believes that the Commission should adopt the "proximity threshold" as the method for determining whether the operation of a new PCS facility creates a cost-sharing obligation.[6] As explained below, this would provide the benefits of simplicity, consistency, and predictability.

A. Definition of the "Proximity Threshold"

The proximity threshold is a bright line test that eliminates any ambiguity whether a PCS provider is required to share the cost associated with relocating an incumbent 2 GHz microwave licensee. As described by one of its proponents:

> The proximity threshold is a rectangle. The length of the rectangle is a line extending through both nodes of the microwave link to a distance of 30 miles beyond each node. The width of the rectangle is a line perpendicular to the microwave path extending 15 miles beyond each node.[7]

Under this system, if a proposed PCS facility would be located anywhere within the "box" constituting the proximity threshold of a relocated path, the party proposing the facility

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[5] BellSouth Comments at 17; PCIA Comments at 35-36; U.S. Airwaves, Inc. ("Airwaves") Comments at 5; Pacific Bell Mobile Services ("PBMS") Comments at 5; TIA Comments at 2, 3-4; DCR Communications, Inc. Comments at 6; Southwestern Bell Mobile Systems, Inc. ("SBMS") Comments at 6-7; UTC Comments at 15. *See* Western Wireless Corporation ("Western") Comments at 8.

[6] The proximity threshold was proposed by AT&T, GTE, PCS PrimeCo, PhillieCo, and Sprint. *See* AT&T Comments at 7-9; GTE Comments at 6; PCS PrimeCo, L.P. ("PrimeCo") Comments at 12-13; Sprint Telecommunications Venture ("Sprint") Comments at 25-26. BellSouth does not endorse all aspects of the cost-sharing plan developed by these parties.

[7] Sprint Comments at 25.

would be required to participate in cost-sharing in accordance with the Reimbursement Table and cost-sharing formula (if applicable).

B. Adoption of the Proximity Threshold will Eliminate Disputes

Adoption of TIA Bulletin 10-F ("10-F") and the Irregular Terrain Model ("ITM") as the only methods for determining interference for purposes of cost-sharing obligations would minimize disputes. However, the proximity threshold *eliminates* the possibility for disputes.

TIA Bulletin 10-F and ITM have proven to be effective tools as part of the PCS design process in analyzing the potential for interference from proposed PCS base stations into existing microwave facilities. Qualified engineers can obtain different results from the application of 10-F and ITM, however, because variances in engineering judgment are permitted by these methodologies.[8] These conflicting results would inevitably lead to disputes (albeit fewer than would be the case if numerous formulas could be used) over whether a PCS entity must share in the costs of a particular microwave relocation.

BellSouth has consistently argued for a cost-sharing trigger mechanism that would "produce consistent results."[9] The proximity threshold meets this requirement; it removes the ambiguity that may arise when 10-F is used. It is simple to employ and yields utterly consistent, predictable results by eliminating the variations which can be associated with the use of 10-F and

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[8] For example, the formulas allow engineers to choose terrain data points at different intervals. Using terrain data taken at wide intervals will achieve a different result than using data taken at narrower intervals. BellSouth has already experienced situations where, for prior coordination notice purposes, its interpretation of 10-F has differed from that of another party by 2 or more dB, which can mean the difference between an interference case and a non-interference case.

[9] BellSouth Comments at 18; BellSouth Comments, RM-8643, filed June 15, 1995; BellSouth Reply Comments, RM-8643, filed June 30, 1995.

ITM. A PCS facility will either fall in the "box" or out of it, with no opportunity for disputes. Utilization of the proximity threshold also will permit existing and prospective PCS providers to project their cost sharing obligations with certainty.

The proximity threshold appears to capture the majority of interference cases that would have been identified using 10-F and ITM. Although the proximity threshold does not take into account obstructions, the considerable benefits of consistency of application and result outweigh the value of using a more accurate, but disputable, technique in those few cases where a reimbursement obligation could have been avoided due to natural or man-made obstructions.[10] The proponents of the proximity threshold are correct; it is a consistent and objective standard.

C. All Co-Block Facilities Located Within the Proximity Threshold Should Trigger a Cost-Sharing Obligation

BellSouth has advocated that only co-channel interference should be analyzed for purposes of determining cost-sharing obligations.[11] For PCS cost-sharing purposes, co-channel should be determined on a frequency block basis — *i.e.*, co-block. Thus, a PCS entity would be co-channel with a microwave licensee if the PCS entity is authorized to operate on the same frequencies as those being used by a microwave incumbent. For example, a B Block PCS licensee is authorized to operate on 1870-1885 MHz and 1950-1965 MHz. By equating co-channel with co-block, a B Block PCS licensee would be co-channel with a microwave licensee operating on a center frequency of 1875 MHz if the PCS licensee's base station was located

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[10] BellSouth stresses that use of the proximity threshold as a cost-sharing trigger has no impact on a PCS entity's obligation not to cause a 2 GHz microwave incumbent interference. *See* TIA Comments at 2, 4-6.

[11] *See* BellSouth Comments at 17-18.

within the proximity threshold of the microwave facility, even if the PCS facility is not using a frequency within the 10 MHz allocated to the microwave incumbent.

In determining cost-sharing obligations, the Commission should not attempt to identify actual interference. Instead, the Commission should create a mechanism whereby PCS entities that likely would benefit from a microwave relocation contribute to the costs of the relocation. Equating co-channel with co-block creates administrative simplicity and promotes rapid and system-wide relocations. In this regard, BellSouth believes that any method of interference reduction, other than relocation, ultimately does not serve the public interest because eventually the incumbent will need to be relocated.[12] Because a PCS entity could "engineer around" a microwave facility on a permanent basis in only rare cases,[13] it benefits from the relocation of *any* microwave paths located in its assigned block and, thus, it should be required to reimburse a Relocator for the benefit conferred.

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12 *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* ET Docket No. 92-9, *Third Report and Order and Memorandum Opinion and Order,* 8 F.C.C.R. 6589, 6600-01 (1993) ("*Third Report*"); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* ET Docket No. 92-9, *Memorandum Opinion and Order,* 9 F.C.C.R. 1943, 1950, 1951 (1994) ("*MO&O*").

13 *See* SBMS Comments at 7; Michael Rappe Comments at 2.

III. The Cost-Sharing Formula Should Be Applied Pursuant to a Revised Reimbursement Table

In its comments, both PCIA and BellSouth urged the Commission to revise its Reimbursement Table consistent with the analysis contained in the *NPRM*.[14] Specifically, it was suggested that the table be revised to reflect that a Relocator is entitled to 100% reimbursement (up to the cost-sharing caps) whenever it relocates a path operating solely on frequencies outside of the PCS block assigned to the Relocator. It also was suggested that the Commission clarify that a Relocator is entitled to reimbursement for half of its relocation expenses (up to the cost-sharing caps) when it relocates a path operating solely on frequencies contained within the Relocator's PCS block, but with only one endpoint within the Relocator's market. In all other regards, BellSouth and PCIA supported the Commission's regimen. BellSouth continues to believe that the Reimbursement Table should be modified consistent with its comments, as well as those submitted by PCIA.

A. Depreciation Under the Cost-Sharing Formula Should Be Calculated From The Date A Microwave Facility Ceases Operation

Microwave relocation agreements currently are being negotiated by A and B Block licensees. By negotiating such agreements, the A and B Block licensees are clearing the 2 GHz band, in many instances to the benefit of unlicensed PCS and subsequent PCS licensees on the C, D, E, and F blocks. Some commenters that plan to bid on the C, D, E, and F blocks urge the Commission, however, to set April 4, 1995 as the commencement of depreciation for all

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[14] BellSouth Comments at 5-9; PCIA Comments at 31.

relocation expenses.[15] Use of this date would penalize A and B block licensees who further the public interest by clearing the 2 GHz band. BellSouth recognizes that subsequent entities are trying to minimize their relocation expenses to the greatest extent possible, but the proposed caps on relocation expenses already protect subsequent PCS entities from paying premiums or exorbitant amounts of money for relocation. As many commenters stated, the caps closely approximate the average cost of relocation.[16]

Since subsequent PCS entities only will have to reimburse a Relocator for the actual costs of a relocation, up to the cost-sharing caps, it would be unfair to allow them to reduce their contributions by calculating depreciation from some arbitrary date, such as April 4, 1995. In most instances, months or years will have passed between April 4, 1995 and the date a Relocator actually relocates a path or places its PCS facilities into service. Accordingly, BellSouth opposes calculating depreciation from April 4, 1995.

BellSouth agrees with AT&T's general statement that "[d]epreciation is properly calculated when plant is put into service," but submits that, in some cases, it will be difficult to ascertain accurately when a Relocator has actually placed facilities into operation.[17] A rational compromise between the uniform date and the service date approaches would be to calculate depreciation from the date specified in a relocation agreement for the microwave facilities to

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15 *See* GO Communications Corporation Comments at 2-3; Airwaves Comments at 3; Omnipoint Communications, Inc. at 3; *see also* Western Comments at 3.

16 SoCal Comments at 6; Alexander Utility Engineering Inc. ("Alexander Utility") Comments at 2; East River at 2; National Rural Electric Cooperative Association ("NRECA") Comments at 5; GTE Comments at 14. *See* BellSouth Reply Comments, RM-8643, filed June 30, 1995, at 13-14.

17 Under the blanket licensing scheme used by the Commission, no applications, notifications, or other filings are submitted when a PCS facility is placed in operation.

cease operation.[18] Because incumbent microwave licensees are not required to be relocated until a PCS entity is ready to place an interfering facility into operation, a Relocator will likely require a microwave incumbent to relocate about the same time the Relocator is ready to deploy what otherwise would be interfering facilities. Thus, the cessation of operations date contained in the relocation agreement should be a close approximation of date PCS operations commence. Moreover, the cessation date is easy to administer and is more equitable than imposing a date unrelated to the relocation of a particular microwave facility. Accordingly, the use of the contractually-specified date as a surrogate for the PCS service date is warranted.

B. PCS Entities Should Be Required to Satisfy Their Cost-Sharing Obligations Within Sixty Days of Issuance of a Prior Coordination Notice

In its comments, Pacific Bell Mobile Services suggests that a PCS entity should be required to reimburse a Relocator within sixty (60) days of its issuance of a prior coordination notice ("PCN") for facilities that would have interfered with a microwave path relocated by the Relocator.[19] BellSouth agrees.[20] Adoption of this "PCN + 60" formula for triggering a cost-sharing payment obligation would be easy to administer. It would avoid disputes over when a facility was actually placed in operation. Further, adoption of the PCN + 60 trigger mechanism still will allow PCS entities to retain some control over when their payments would be due,

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18 *See* BellSouth Comments at 4, 11; PCIA Comments at 34; Sprint Comments at 28; NRECA Comments at 5; SBMS Comments at 7.

19 PBMS Comments at 6.

20 As stated above, BellSouth believes that "interference" for cost-sharing purposes should be determined according to the proximity threshold. *See* pages 2-6 *supra*. BellSouth also notes that in the case of designated entities, the sixty-day period would trigger the first installment payment obligation, rather than full reimbursement.

because it provides a sixty-day window. A party wishing to delay payment obligations as long as possible could wait to send out its PCN until sixty days prior to the service date.

C. UTAM's Payment Obligation Should Begin Once the County in Which the Relocated Facility was Located Has Been Cleared For Unlicensed PCS Use Without Site Specific Prior Coordination

BellSouth concurs with UTAM that there are sufficient differences between licensed and unlicensed PCS to warrant a different mechanism for triggering a payment obligation by UTAM.[21] Accordingly, BellSouth has no objection to UTAM's proposal that its payment obligation arises only when:

- a county is cleared of microwave links in the unlicensed allocation and UTAM raises a Zone 1 power cap as a result of third party relocation activities; or
- a county has been cleared of microwave links in the unlicensed allocation and UTAM reclassifies a Zone 2 county to Zone 1 status which could not have been done without third party relocation activities.[22]

As UTAM stated, this "'trigger' mechanism ties the incurring of cost sharing obligations by UTAM to the time at which unlicensed device manufacturers will benefit from increased deployment in a county because of microwave relocations."[23]

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21 UTAM Comments at 5-6. As with all parties subject to the cost-sharing rules, UTAM should be required to file PCNs with the clearing house.

22 *Id.* at 6.

23 *Id.* In keeping with the financial capabilities of its members, UTAM only should be entitled to make installment payments over a five-year period. *See* PCIA Comments at 38.

IV. Membership in the Clearing House Should Be Mandatory

BellSouth opposes the suggestion that PCS entities should be able to opt out of the clearing house if they have entered into private relocation agreements.[24] Although BellSouth supports the idea of allowing private parties to enter into cost-sharing arrangements that differ from the mechanism ultimately adopted by the Commission, the Commission should make clear that these parties *must* become members of the clearing house. Membership in the clearing house is essential to ensure proper start-up funding by the A and B Block PCS licensees. If these licensees are allowed to "opt out," it will be extremely difficult to determine what the size of the membership will be and how much each licensee must contribute to cover start-up expenses.

Once operational, it is expected that the clearing house will charge for its services on a per transaction basis.[25] Each A and B Block PCS licensee will receive a credit for the start-up funds it provides to the clearing house which it can use to offset the clearing house's transaction fees.[26] Thus, once a party provides its portion of the start-up expenses, it would not be responsible for any additional funding unless it utilizes the clearing house as the vehicle for obtaining cost-sharing payments or it has exhausted its start-up credits.[27]

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[24] *See* AT&T Comments at 6.

[25] A "transaction" is defined as the notification of a PCS entity by the clearing house that the entity has incurred a cost-sharing or reimbursement obligation.

[26] Once the clearing house has notified a PCS entity that it has incurred a cost-sharing or reimbursement obligation, it will notify the affected Relocator that (1) the PCS entity owes the Relocator a cost-sharing payment, and (2) the Relocator owes the clearing house a transaction fee.

[27] BellSouth notes that, even if parties have entered into private contractual arrangements, the clearing house may be the most efficient vehicle for administering these arrangements. Private agreements, such as the one entered into by AT&T, GTE, Sprint,

(continued...)

BellSouth also opposes the suggestion that a clearing house organization should be selected through a competitive bidding process.[28] BellSouth has been working actively within the PCS industry to develop a cost-sharing mechanism and agrees that PCIA should be designated as the clearing house.[29] PCIA was an original proponent of cost-sharing rules[30] and represents most of the entities that would utilize the clearing house. Further, PCIA satisfies all of the criteria that BellSouth suggested for choosing an entity to act as the clearing house.[31]

BellSouth disagrees with those commenters who suggested that disputes be brought to the clearing house for resolution. [32] To ease administration of the cost-sharing rules and avoid any appearance of impropriety, all disputes regarding cost-sharing obligations should be resolved

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27 (...continued)
PCS PrimeCo, and PhillieCo, will become increasingly complex to administer as reimbursement is sought for relocating links in the C, D, E, and F Blocks, which effectively constitute 1,972 separate markets.

28 *See* Industrial Telecommunications Association, Inc. Comments at 8.

29 *See* PCIA Comments at 39-43.

30 *See NPRM* at ¶ 17 (citing PCIA Petition for Partial Reconsideration, Gen Docket No. 90-314, filed July 25, 1994, at 5-7).

31 BellSouth Comments at 14. PCIA is a not-for-profit association with no allegiance to any particular PCS entity, or group thereof. It is BellSouth's understanding that PCIA would be able to commence operations as the clearing house within 90 days after selection. PCIA has sufficient spectrum and data management experience, as well as a viable business plan for equitably securing start-up and ongoing funding. In fact, "as a result of its merger with the National Association of Business and Education Radio (NABER), PCIA is now the largest FCC-designated frequency coordinator in the Business Radio Service." PCIA Comments at 40. Based on its experience, PCIA should have no problem ensuring the confidentiality of the cost-sharing information it receives.

32 Sprint Comments at 30; Airwaves Comments at 8; Western Comments at 10.

using alternative dispute resolution techniques.[33] The clearing house should not be involved in dispute resolution; its duties should be ministerial in nature only.

BellSouth continues to support the Commission's proposal to require two independent cost estimates during the voluntary negotiation period.[34] Such a requirement will facilitate voluntary negotiations, lessen premium payment demands, and provide both parties with the estimated cost of comparable facilities during the mandatory negotiation period.

V. The Proposed Caps Are Reasonable

Most commenters addressing the proposed caps on cost-sharing obligations support them.[35] Microwave incumbents generally oppose the caps, however, on the ground that caps would diminish the payments received by incumbents for relocation.[36] In fact, the cost-sharing caps would not limit payments to microwave incumbents; they would only limit payments between PCS entities to actual relocation expenses up to $250,000 for per-link expenses and

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33 *Accord* San Diego Comments at 9.

34 BellSouth Comments at 11-12; *NPRM* at ¶¶ 67, 78.

35 *See* Central Iowa Power Cooperative Comments at 1; San Diego Comments at 5; Williams Wireless Comments at 3; Alexander Utility Comments at 2-3; East River Comments at 2; NRECA Comments at 5; Western Comments at 6; PCIA Comments at 8-10; GO Communications Corporation Comments at 5; Airwaves Comments at 2; UTAM Comments at 11; Iowa L.P. 136 Comments at 2; TIA Comments at 8-9; *see also* AT&T Comments at 10-11; PrimeCo Comments at 8-9.

36 *See* Valero Comments at 3; American Petroleum Institute Comments at 10; SoCal Comments at 4-5; UTC Comments at 12-14; APCO Comments at 13-14; Los Angeles Comments at 3; American Gas Association Comments at 4; The Southern Company's Comments at 4-6; APPA Comments at 3; Santee Cooper Comments at 2-3; Tenneco Energy Comments at 12-14; Maine Microwave Associates Comments at 2; Interstate Natural Gas Association of America Comments at 2.

$150,000 for tower construction.[37] As some 2 GHz microwave incumbents properly noted, "the cost sharing cap is not an upper limit on permissible compensation to incumbents."[38] A microwave incumbent cannot be relocated unless it receives comparable facilities, without regard to cost.

Those arguing against caps are merely seeking larger premiums. Relocation costs should be compensatory in nature, not a windfall for microwave incumbents.

BellSouth opposes adoption of a flexible cap.[39] As the demands of incumbents increase, it will become difficult to differentiate between actual costs and premiums. Litigation will increase because parties will be more apt to argue over what constitutes "actual" relocation costs. Accordingly, the Commission should establish rigid caps on relocation expenses.

VI. Tower Modifications Should Be Subject to the $150,000 Cap

In its comments, BellSouth noted that tower modifications should be included in the $150,000 cap, rather than the $250,000 cap.[40] Many existing microwave towers require modifications at substantial expense before replacement facilities may be mounted on them. If tower modifications are included in the capped per-link expenses, the Commission could be encouraging the unnecessary construction of new towers, even though tower modifications might

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37 Although the proposed cap of $150,000 only applies to tower construction, BellSouth has urged the Commission to include tower modifications in this cap.

38 San Diego Comments at 5. *Accord* Williams Wireless Comments at 3; Alexander Utility Comments at 2-3.

39 *See* UTC Comments at 14; Southern Company Comments at 5-6; AT&T Comments at 5, n.11; PrimeCo Comments at 8-9; Sprint Comments at 27.

40 BellSouth Comments at 18-19.

be more economical. Accordingly, the Commission should specify that the separate $150,000 cap for towers applies to both construction and modification.[41]

VII. Reimbursable Expenses During the Voluntary Negotiation Period

BellSouth notes that the Commission's relocation procedures were adopted before competitive bidding rules were established for PCS. Under the relocation procedures, the Commission "balanced" the interests of incumbents and PCS licensees.[42] The adoption of competitive bidding rules, however, upset this balance by forcing PCS licensees to "rush to market" in order to earn a return on the prices paid for their licenses. This financial pressure gives incumbents the upper hand in negotiations because every day that PCS deployment is delayed PCS entities lose money. As PCIA noted, incumbents are also being informed that PCS licensees will lose $5 million per month of delay in implementing their systems.[43] To remain competitive, PCS entities must relocate the microwave incumbents as soon as possible. Under these circumstances, negotiations are not truly "voluntary."

Microwave incumbents have taken full advantage of this situation. Their advisors note that, because of the "voluntary negotiation period, *comparable facilities [are the] worst-case scenario*. Even if you are eventually relocated involuntarily, you always are entitled to compara-

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41 However, BellSouth again urges the Commission to specify that the $150,000 cap applies to the construction and modification of all towers associated with a link and not a separate cap of $150,000 for each tower associated with a link. *See* BellSouth Reply Comments, RM-8643, filed June 30, 1995, at 4.

42 *See Third Report*, 8 F.C.C.R. at 6592.

43 PCIA Comments at 7 (referencing UTC Service Corporation Bulletin, "Important Information For All 2 GHz Licensees - Big Money and Your 2 GHz Microwave Band Relocation," Nov. 21, 1994, at 3 ("UTC Bulletin")).

ble facilities. If you relocate voluntarily, you are entitled to anything that is mutually agreeable."[44]

The public interest would not be served by giving incumbents the ability to delay PCS deployment in the expectation of a windfall. To counter the disincentives to rapid relocation, the Commission should create incentives for incumbents to relocate during the voluntary negotiation period.

A. Replacement of an Analog 2 GHz Microwave System with a Digital Microwave System on New Frequencies

The Commission has stated that an incumbent microwave licensee only is entitled to "comparable facilit[ies] at minimum cost to the new service provider" [45] and that it intended to minimize the costs of relocating 2 GHz microwave incumbents.[46] Despite these pronouncements, many 2 GHz microwave incumbents oppose revisions to the relocation rules that would carry out these policies. Some incumbents argue that they are entitled to digital equipment because their current analog equipment was state-of-the-art when it was installed.[47] Other

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44 *See* Keller and Heckman, Telecommunications Advisor, Volume IV, Spring/Summer 1995 (emphasis added); *see also* UTC Bulletin.

45 *See Redevelopment of Spectrum to Encourage Innovation to Encourage Use of New Telecommunications Technologies*, ET Docket No. 92-9, *Second Memorandum Opinion and Order*, 9 F.C.C.R. 7797, 7802 (1994).

46 *Redevelopment of Spectrum to Encourage Innovation to Encourage Use of New Telecommunications Technologies*, ET Docket No. 92-9, *Notice of Proposed Rule Making*, 7 F.C.C.R. 1542, 1545 (1992) ("*Initial Notice*").

47 *See* APCO Comments at 6; Tenneco Energy Comments at 10; East River Comments at 2; NRECA Comments at 6; American Gas Association Comments at 3-4.

incumbents imply that the Commission should require that analog equipment be replaced with digital equipment to ensure the long term reliability of these systems.[48]

BellSouth agrees with Alexander Utility Engineering, however, that digital and analog equipment is not comparable and once incumbents come to this realization, parties would be able "to more realistically approach the negotiation process."[49] The Commission's relocation rules are intended to make the microwave incumbent whole and to ensure that incumbents are not adversely affected by relocation — not to upgrade incumbents' systems to the latest technology at the expense of others. Replacement of existing 2 GHz analog equipment with new analog equipment in a different band does nothing to diminish the long-term reliability of the system — indeed, reliability will be improved. The relocation rules were not intended to provide a windfall to microwave incumbents; rather, the rules balance the interests of incumbents and emerging technology providers.

Although there should be no *entitlement* to digital replacement equipment, the Commission should give Relocators the option of providing such replacement equipment on a reimbursable basis during the voluntary negotiation period only. As Pacific Bell Mobile Services noted, the definition of "comparable" should change between the voluntary and mandatory negotiation periods.[50] By allowing reimbursement for the replacement of analog equipment with digital equipment during the voluntary negotiation period, the Commission will give Relocators an incentive to offer digital equipment as an enticement for quick relocation. The public interest

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48 APCO Comments at 6; Interstate Natural Gas Association of America Comments at 2.

49 Alexander Utility Comments at 2-3 (Alexander Utility provides engineering services to microwave incumbents).

50 PBMS Comments at 8. *See* Western Comments at 5.

will be served by this policy because PCS will be deployed quicker and the long-term reliability of relocated systems will be improved.[51]

B. Legal and Consulting Fees Should Be Recoverable During the Voluntary Negotiation Period Only

Many 2 GHz microwave incumbents oppose the Commission's proposal to not require relocators to reimburse incumbents for legal and consulting fees during the mandatory negotiation period.[52] BellSouth supports reimbursement for legal and consulting fees only if an agreement is reached during the voluntary negotiation period. Such a limitation will provide an incentive for incumbents to reach relocation agreements during the voluntary negotiation period. As one incumbent noted, incumbents are "sophisticated parties with substantial resources."[53] Incumbents should not be given the incentive to hire consultants in an effort to extract premiums from PCS entities. For example, one incumbent paid a consultant $180,000 to negotiate the relocation of only four paths.[54] The only possible explanation for this fee is that the incumbent felt that it would be more than repaid in the form of a premium. The Commission should not

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51 If reimbursement were available during the mandatory negotiation period for the replacement of analog equipment with digital equipment, incumbents would have no incentive to accept an offer of digital replacement equipment during the voluntary negotiation period. Once offered, the incumbent would view digital equipment as the "worst-case scenario."

52 *See* APCO Comments at 8-9; Central Iowa Power Cooperative Comments at 1; San Diego Comments at 10-11; East River Comments at 2; Los Angeles Comments at 5-6; NRECA Comments at 5; Santee Cooper Comments at 2; SoCal Comments at 8; UTC Comments at 24-25.

53 Association of American Railroads Comments at 14.

54 *See* San Diego Comments at 1; PCIA Comments at 6.

encourage incumbents to expect such premiums by making consultants' fees reimbursable during the mandatory negotiation stage.

VIII. Twelve Month Test Period Should Be Waivable

PCS entities generally urged the Commission to clarify that incumbents can waive their right to a twelve month test period.[55] BellSouth concurs. The Commission should not allow a microwave incumbent that has waived its right to a trial period in a private contractual arrangement to request relocation back to the 2 GHz band because its new facilities are not comparable. The new facilities would have been designed and constructed to the specifications of the incumbent — a sophisticated telecommunications user with substantial experience and resources.[56] There is no reason to require a PCS entity to return an incumbent to the 2 GHz band because the incumbent's system design proved faulty or because it squandered a lump-sum payment.[57]

IX. Sunset of the Cost-Sharing Rules for PCS Entities

BellSouth concurs with the commenters suggesting that the cost-sharing plan should sunset for all PCS providers on April 4, 2005, ten years after the commencement of the voluntary

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55 AT&T Comments at 12; GTE at 19; PBMS Comments at 12; PrimeCo Comments at 20; PCIA Comments at 24; SBMS Comments at 5-6; UTAM Comments at 18-19; Western Comments at 16.

56 See Association of American Railroads Comments at 14.

57 It should be noted that a PCS entity cannot force the incumbent to agree to waive the trial period or build its own facilities; the incumbent must voluntarily agree to do so.

negotiation period.[58] Once the plan sunsets, no new cost-sharing obligations can be imposed. The sunset of the plan should have no effect, however, on debts incurred prior to April 4, 2005. Thus, parties choosing to satisfy their cost-sharing obligations through installment payments must continue to make such payments regardless of the "sunset."[59]

Once the rules sunset, BellSouth supports assigning secondary status to all remaining 2 GHz microwave incumbents. The Commission has provided microwave incumbents with adequate notice that their primary status will not continue indefinitely. In the initial *Notice of Proposed Rule Making* in this proceeding, the Commission stated:

> we propose to allow currently licensed 2 GHz fixed licensees to continue to occupy 2 GHz frequencies on a co-primary basis with new services for a fixed period of time, for example ten or fifteen years. Ten years could generally be expected to provide for a complete amortization of existing 2 GHz equipment. A fifteen year period would extend the relocation period through the useful life of that equipment. At the end of this transition period, these facilities could continue to operate in the band on a secondary basis.[60]

Although the Commission concluded that a transition period would provide an appropriate balance between the rights of incumbents and new technology providers, it indicated that it

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58 PCIA Comments at 38-39.

59 BellSouth continues to support the proposed installment plan for C and F Block PCS licensees. Allowing other entities to claim eligibility for cost-sharing installment payments in other blocks will only cause confusion and litigation. Accordingly, BellSouth opposes Omnipoint's request to satisfy its cost-sharing obligations in the New York MTA via installments.

60 *Initial Notice*, 7 F.C.C.R. at 1545. *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 F.C.C.R. 6886 (1992) (noting that "current 2 GHz fixed microwave licensees [would be allowed] to continue operating on a co-primary basis with new services for some fixed period after which they would be reduced to secondary status.").

would revisit the issue if its relocation rules proved problematic.[61] The time to revisit that decision is now.

The Commission's "goal is to facilitate rapid implementation of new services in the emerging technology bands."[62] The fact that incumbents currently have the upper hand with regard to relocation negotiations stands in the way of the Commission's goal. All PCS licenses should have been assigned well in advance of April 4, 2005 and microwave incumbents will have had ample opportunity to negotiate relocation arrangements. The public interest in rapid deployment would clearly be served by establishing a fixed endpoint for the incumbents' ability to hold out.

Incumbents will not face any significant disadvantage as a result of this sunset. Because new 2 GHz microwave paths are not being assigned primary status, any 2 GHz microwave paths remaining in 2005 will be more than 10 years old and, as the Commission noted, should be fully amortized.[63] Similarly, thirteen years will have passed between the Commission's Public Notice requesting that microwave licensees avoid using 2 GHz facilities and the proposed transition date to secondary status. The useful life of 2 GHz equipment is only fifteen years.[64] Thus, there will be little harm in assigning secondary status to remaining 2 GHz incumbents on April 4, 2005.

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61 *Third Report*, 8 F.C.C.R. at 6596.

62 *Id.* at 6603.

63 *Initial Notice*, 7 F.C.C.R. at 1545.

64 *Id.*